



**copyright alliance**

Connecting creators · Protecting creative work

**BEFORE THE  
U.S. COPYRIGHT OFFICE**

**Study on the Right of Making Available;  
Request for Comments**

**Docket No. 2014-2**

**COMMENTS OF THE COPYRIGHT ALLIANCE**

The Copyright Alliance welcomes the opportunity to respond to a few of the questions posed by the Copyright Office in its Notice of Inquiry on February 25, 2014, regarding the right of communication with the public and the right of making available. The Copyright Alliance is a non-profit public interest and educational organization that is supported by nearly forty entities comprised of individual artists and creators, as well as the associations, guilds, and corporations that invest in and support them. Besides these institutional members, we represent more than 13,000 individual artists. The Copyright Alliance is committed to promoting the cultural and economic benefits of copyright, providing information and resources on the contributions of copyright, and upholding the contributions of copyright to the fiscal health of the nation and for the good of creators, owners, and consumers around the world. Among other principles, we seek to promote appropriate copyright protection and enforcement to encourage the creation and lawful distribution of works, with fair compensation to the authors of creative works. While many of the entities we represent are small businesses and individual creators, all who participate in the copyright ecosystem have an interest in effective mechanisms for registering and licensing copyrights.

## **Introduction**

In a perfect world, the Copyright Act would contain a clearly articulated, broad making available right with specifically enumerated exceptions as needed to serve the public interest. Although this is not how the statute is currently drafted, we believe the bundle of rights established in §106, when interpreted as Congress intended and in accordance with international treaty obligations, adequately addresses the making available right. Therefore, we do not believe legislative changes are necessary at this point. We do, however, encourage the U.S. Copyright Office and Congress to remain watchful and ready to address judicial erosion of the right, should it occur, in order to ensure continued compliance with Congress' intent and U.S. international obligations. The Copyright Office could serve a useful role by providing analysis and guidance for courts to help guide their interpretation of the law.

The legislative history of the 1976 Copyright Act shows Congress intended the bundle of exclusive rights to be broad and technology-neutral to incentivize the creation and dissemination of works regardless of technological advances that occur with the passage of time. In recent years, some courts have strayed away from this policy framework in certain respects. In the specific case of the right of making available, some courts have created a requirement of actual distribution to prove infringement of the distribution right. In other cases, still under appeal, courts have created potential loopholes to important rights such as the public performance right. If these court-created impairments to the incentives for the creation and dissemination of creative works are perpetuated, they will over time be detrimental to the public interest. Appropriate protections and interpretation of the making available right, including the correct interpretation of the rights of distribution and public performance are especially important in the digital era because authors are exposed to the potentially massive erosion of their rights.

Part I of this comment refers to instances in the legislative history of the 1976 Copyright Act that show that the rights of communication to the public and making works available are (1) implicit in the bundle of exclusive rights in §106, (2) technology neutral, and (3) part of the U.S. international treaty obligations. Part II catalogs judicial decisions that have correctly interpreted the Copyright Act and decisions that have strayed from Congress' intent and points to the

heightened importance that the rights of communication to the public and making works available have in the digital age.

### **I. The Right Of Communication To The Public And Making Available Is Implicit In The Bundle Of Exclusive Rights In §106**

The authors' exclusive rights to make her work available or otherwise communicate it to the public exist regardless of the technology or medium in which a work exists. The legislative record shows that the right of communication to the public and its subset right of making available are both implicit in existing copyright law as part of the bundle of exclusive rights established in §106. The adhesion of the U.S. to the WIPO Treaties further confirms that the right of making available is part of U.S. law. A different interpretation would leave the U.S. non-compliant with its international obligations. Regarding the applicability of the right of making available to the context of the digital environment, legislative history also shows that Congress intended the 1976 Copyright Act to be technology neutral. Moreover, with the Digital Theft Deterrence and Copyright Damages Improvement Act of 1999, Congress made it clear it intended the Copyright Act to apply to the digital environment.

Legislative history of the rights of distribution and public performance indicates that Congress was concerned with protecting authors' communication with the public generally, rather than with the specific form that communication may take. For instance, Congress sought to have the right of distribution in the 1976 Act encompass the 1909 Act rights to publish and vend; at that time, it was clear, that 'publication' encompassed "the offering of copyrighted works to the public."<sup>1</sup> Based on an in-depth study of the legislative history, Peter Menell explains that with the change in language from publication to distribution, Congress sought "(1) for the right to distribute to fully encompass the [1909] right to publish; (2) for distribute to be understood by reference to established understanding of publish and publication; and (3) that

---

<sup>1</sup> See generally Peter S. Menell, *In Search of Copyright's Lost Ark: Interpreting the Right to Distribute in the Internet Age*, 59 J. Copyright Soc'y U.S.A. 1, 38 (2011) (explaining that "No court recognized a requirement to prove actual distribution of copies . . . Contrary to the inference made by some jurists in file-sharing cases, the legislative history of the 1976 Act makes clear that congress intended in the 1976 Act to encompass the broad right to publish recognized in prior law).

jurisprudential confusion in interpreting publication as regards statutory formalities not narrow or obfuscate the understanding of the exclusive right to distribute/publish.”<sup>2</sup> Moreover, the definition of ‘publication’ in §101 also implicates the right of making available when it establishes that “[t]he offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication.”<sup>3</sup>

With regards to the right of public performance and public exhibition, the U.S. Copyright Office Supplementary Report of 1965 states:

Since the Report was issued in 1961 we have become increasingly aware of the enormous potential importance of showing, rather than distributing, copies as a means of disseminating an author's work. In addition to improved projection equipment, the use of closed-and open-circuit television for presenting images of graphic and textual material to large audiences of spectators could, in the near future, have drastic effects upon copyright owners' rights. Equally if not more significant for the future are the implications of information storage and retrieval devices; when linked together by communications satellites or other means, these could eventually provide libraries and individuals throughout the world with access to a single copy of a work by transmission of electronic images. It is not inconceivable that, in certain areas at least, "exhibition" may take over from "reproduction" of "copies" as the means of presenting authors' works to the public, and we are now convinced that a basic right of public exhibition should be expressly recognized in the statute.<sup>4</sup>

U.S. international obligations’ confirm the implicit inclusion of the right of making available in §106. In 1997, the U.S. joined the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.<sup>5</sup> Article 8 of the WCT establishes authors’ “exclusive

---

<sup>2</sup> *Id.* at 45-46.

<sup>3</sup> 17 U.S.C. § 101 (emphasis added).

<sup>4</sup> Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill, 89th Cong., 1st Sess., 20-21 (House Comm. Print 1965) (adding “We have now come to realize, however, that in the future, textual or notated works [books, articles, the text of the dialogue and stage directions of a play or pantomime, the notated score of a musical or choreographic composition, etc.] may well be given wide public dissemination by exhibition on mass communications devices. The 1965 bill therefore enlarges the right of public exhibition to cover all classes of works except motion pictures and sound recordings.”).

<sup>5</sup> World Intellectual Property Organization, *WIPO-Administered Treaties: Contracting Parties – United States* (Apr. 3, 2014, 11:06AM), [http://www.wipo.int/treaties/en/ShowResults.jsp?country\\_id=179C](http://www.wipo.int/treaties/en/ShowResults.jsp?country_id=179C).

right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.”<sup>6</sup> Articles 10 and 14 of the WPPT provide that “[p]erformers [and phonogram producers] shall enjoy the exclusive right of authorizing the making available to the public of their performances fixed in phonograms [and phonograms], by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.”<sup>7</sup> The 1976 Copyright Act was not amended to reflect the U.S.’ international obligations with regards to the rights of communication to the public and right of making available.<sup>8</sup> Evidence in the legislative history signals that the lack of change was due to the right of communication to the public being implicit in the existing text of §106.<sup>9</sup>

There are at least two sources that support the applicability of the right of making available in the digital era. First, the legislative history reveals that Congress was expressly concerned with making the 1976 Act technology-neutral.<sup>10</sup> Second, with the Digital Theft

---

<sup>6</sup> S. Treaty Doc. No. 105-17 (1997).

<sup>7</sup> *Id.*

<sup>8</sup> David Carson, *Making the Making Available Right Available*, 33 COLUM. J.L. & ARTS 135, 146-47 (2010) (explaining “the consensus within the Copyright Office and the Patent and Trademark Office, the two expert agencies involved in the negotiations and the formulation of implementing legislation, was that no change in U.S. domestic law was required to implement the making available right. Internal analysis, relying on case law involving computer bulletin board services and on the Copyright Act’s definition of publication, concluded that our distribution right covered the making available of copies for electronic transmission. Congress was advised informally that the United States could implement the making available right through a combination of the existing distribution right and the rights of public performance and public display.”).

<sup>9</sup> See *Online Copyright Infringement Liability Limitation Act, Hearing on H.R. 2281 and H.R. 2280 Before the Subcomm. on Courts and Intellectual Property of the H. Comm. on the Judiciary*, 105th Cong. 43-44 (1997) (statement of Marybeth Peters, Register of Copyrights) (explaining that the bill’s two amendments to copyright law concerned circumvention of technological protective measures and the alteration or removal of copyright management information. Otherwise, Peters explained that the WIPO Treaties aimed at bringing other countries up to par with US protections and that existing US copyright protections adequately fulfilled substantial treaty obligations).

<sup>10</sup> Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill, 89th Cong., 1st Sess., 14-15 (House Comm. Print 1965) (“Obviously no one can foresee accurately and in detail the evolving patterns in the ways author’s works will reach the public 10, 20, or 50 years from now. Lacking that kind of foresight,

Deterrence and Copyright Damages Improvement Act of 1999, Congress made it clear it intended the Copyright Act to apply to the digital environment.<sup>11</sup>

## **II. In The Digital Age, It Is Important To Continue To Ensure That The Law Upholds A Robust, Technology Neutral Making Available Right**

With the Copyright Act of 1976, Congress “set forth the copyright owner’s exclusive rights in broad terms in section 106, and then... provide[d] various limitations, qualifications, or exemptions in the twelve sections that follow.”<sup>12</sup> As explained above, Congress also took a technology-neutral approach when drafting §106. As a result, the type of technology in which a creative work is embedded is irrelevant for purposes of judicial analysis. Decisions regarding the right of making available have generally endorsed an appropriate, technology-neutral interpretation of the Copyright Act. However, some courts have diverged from the text and intent of the Copyright Act and taken a too-narrow approach that runs contrary to a right of making available.

---

the bill should, we believe, adopt a general approach aimed at providing compensation to the author for future as well as present uses of his work that materially affect the value of his copyright. . . . A real danger to be guarded against is that of confining the scope of an author's rights on the basis of the present technology so that, as the years go by, his copyright loses much of its value because of unforeseen technical advances. For these reasons, we believe that the author's rights should be stated in the statute in broad terms, and that the specific limitations on them should not go any further than is shown to be necessary in the public interest.”); Peter S. Menell, *In Search of Copyright’s Lost Ark: Interpreting the Right to Distribute in the Internet Age*, 59 J. Copyright Soc’y U.S.A. 1 (2011).

<sup>11</sup> Amendment to the 1976 Act, Pub. L. No. 106-160, 113 Stat. 1774; H.R. Rep. No. 106-216, at 3 (1999) (explaining “many computer users are either ignorant that copyright laws apply to Internet activity, or they simply believe that they will not be caught or prosecuted for their conduct. Also, many infringers do not consider the current copyright infringement penalties a real threat and continue infringing, even after a copyright owner puts them on notice that their actions constitute infringement and that they should stop the activity or face legal action. In light of this disturbing trend, it is manifest that Congress respond appropriately with updated penalties to dissuade such conduct. H.R. 1761 increases copyright penalties to have a significant deterrent effect on copyright infringement.”).

<sup>12</sup> H.R. Rep. No. 94-1476, at 61 (1976).

Some courts have properly determined that infringement of the right of distribution occurs without a showing of actual distribution.<sup>13</sup> Some other courts, however, have limited authors' right of communication with the public by creating a requirement of actual distribution to a third party to prove infringement of the right of distribution.<sup>14</sup> More recently, great attention has been focused on the proper interpretation of the public performance right. Courts that have analyzed this issue in line with Congressional intent have ruled in favor of a broad, technologically neutral public performance right.<sup>15</sup> In contrast, other courts have taken an

---

<sup>13</sup> See *New York Times Co., Inc. v. Tasini*, 533 U.S. 483, 504 (2001) (explaining that “the fact that a third party can manipulate a[n electronic] database to produce a non infringing document does not mean the database is not infringing. Under §201(c), the question is not whether a user can generate a revision of a collective work from a database, but whether the database itself perceptibly presents the author's contribution as part of a revision of the collective work.”); *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 552 (1985) (holding that the 1976 Act “also recognized for the first time a distinct statutory right of first publication, which had previously been an element of the common-law protections afforded to unpublished works.”); *Hotaling v. Church of Latter Day Saints*, 118 F.3d 199, 203 (4th Cir. 1997) (stating that “to establish distribution of a copyrighted work, a party must show that an unlawful copy was disseminated to the public”; and holding that “when a public library adds a work to its collection, lists the work in its index or catalog system, and makes the work available to the borrowing or browsing public, it has completed all the steps for distribution to the public. At that point, members of the public can visit the library and use the work. Were this not to be considered distribution within the meaning of §106(3), a copyright holder would be prejudiced by a library that does not keep records of public use, and the library would unjustly profit by its own omission.”); *Arista Records LLC v. Greubel*, 453 F.Supp.2d 961, 971 (N.D. Tex. 2006) (citing and following *Hotaling*); *Warner Bros. Records, Inc. v. Payne*, No. W-06-CA051, 2006 WL 2844415, at \*3-\*4 (W.D.Tex. July 17, 2006) (citing and following *Hotaling*).

<sup>14</sup> See *Nat'l Car Rental Sys., Inc. v. Computer Assocs. Int'l, Inc.*, 991 F.2d 426, 434 (8th Cir. 1993) (stating that infringement of the distribution right requires the actual dissemination of copies or phonorecords); *In re Napster, Inc. Copyright Litig.*, 377 F. Supp. 2d 796, 802-05 (N.D. Cal. 2005) (criticizing *Hotaling* as being “contrary to the weight of [other] authorities” and “inconsistent with the text and legislative history of the Copyright Act of 1976.”); *London-Sire Records, Inc. v. Doe 1*, 542 F. Supp. 2d 153 (D. Mass. 2008) (ruling that “to constitute a violation of the distribution right under § 106(3), the defendants' actions must do more than ‘authorize’ a distribution; they must actually ‘do’ it”; and “by the plain meaning of the statute, all ‘distributions ... to the public’ are publications. But not all publications are distributions to the public — the statute explicitly creates an additional category of publications that are not themselves distributions... Plainly, ‘publication’ and ‘distribution’ are not identical. And Congress' decision to use the latter term when defining the copyright holder's rights in 17 U.S.C. § 106(3) must be given consequence. In this context, that means that the defendants cannot be liable for violating the plaintiffs' distribution right unless a ‘distribution’ actually occurred.”).

approach which creates a convoluted, hard to apply test and improperly narrows the public performance right.<sup>16</sup> It is too soon to tell whether the Supreme Court will adhere to Congress' intent in enacting the right of public performance when it hears the *Aereo* case.<sup>17</sup>

Appropriate protections and interpretation of the making available right, including the correct interpretation of the rights of distribution and public performance are especially important in the digital era. In the Internet Age, the effects of infringement on authors, and by extension on consumers, are particularly harmful. Therefore, an effective right of communication to the public and making works available is key today to achieving the ultimate goal of the Copyright Act. In an era when public access to creative works is easier than ever, ensuring the enforcement of an author's right of making her work available to the public is crucial to incentivizing the creation and dissemination of new works.

---

<sup>15</sup> See *Cmty. Television of Utah, LLC v. Aereo, Inc.*, No. 2:13CV910DAK, 2014 WL 642828 (D. Utah, Feb. 19, 2014); *Fox Television Stations, Inc. v. FilmOn X LLC*, No. 13-758, 2013 WL 4763414, at \*25 (D.D.C. Sept. 5, 2013) *reconsideration denied* No. 13-758 RMC, 2013 WL 4852300 (D.D.C. Sept. 12, 2013); *Fox Television Stations, Inc. v. BarryDriller Content Sys., PLC*, 915 F. Supp. 2d 1138, 1144 (C.D. Cal. 2012); *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275 (2nd Cir. 2012); *Warner Bros. Entm't, Inc. v. WTV Sys.*, 824 F. Supp. 2d 1003 (C.D. Cal. 2011); *Stipulated Consent Judgment and Permanent Injunction, CBS Broad., Inc. v. FilmOn.com, Inc.*, 10 CIV. 7532. NRB, 2010 WL 4840091 (S.D.N.Y. Aug. 9, 2012) (Dkt. No. 49); *Twentieth Century Fox Film Corp. v. iCraveTV, Nos. Civ. A. 00-120, Civ. A. 00-121*, 2000 WL 255989 (W.D. Pa. Feb. 8, 2000).

<sup>16</sup> See *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008) (holding that Cablevision's transmissions of programs recorded were not public performances because (1) the RS-DVR system created unique copies of every program a Cablevision customer wished to record; and (2) the RS-DVR's transmission of the recorded program to a particular customer was generated from that unique copy; no other customer could view a transmission created by that copy); *Hearst Stations Inc. v. Aereo, Inc.*, No. 13-11649-NMG, 2013 WL 5604284 (D. Mass. Oct. 8, 2013) (denial of preliminary injunction) (holding that Aereo is not likely to infringe the right of public performance because the technology creates unique copies of each program a customer wished to record and a customer could only view the unique copy that was generated on his behalf); *WNET v. Aereo, Inc.*, 712 F. 3d 676 (2d Cir. 2013) *cert. granted*, 134 S. Ct. 896 (2014) (affirming the denial of a preliminary injunction and holding that, pursuant to Cablevision, Aereo did not infringe plaintiffs' right of public performance because Aereo's transmissions are generated and received by one individual user).

<sup>17</sup> See *WNET v. Aereo, Inc.*, 712 F. 3d 676 (2d Cir. 2013) *cert. granted*, 134 S. Ct. 896 (2014).



## **Conclusion**

There is no need for Congressional action at this time because the legislative history and the U.S. international obligations make it clear that the right of making available is implicit in the rights of distribution, public performance and public display. The Copyright Office could serve a helpful role issuing much-needed guidelines to courts on how the making available right should be interpreted in accordance with Congressional intent, the public interest and the U.S. international obligations. However, the decision of the Supreme Court in *Aereo*, or other future court decisions, might make it necessary for Congress to intervene and expressly include the right of making available into the Copyright Act.

Respectfully submitted,

Terry Hart  
Director of Legal Policy  
Copyright Alliance

Sofia Castillo  
Legal Fellow  
Copyright Alliance